**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 85OF 2013**

**KULWANT SINGH ROOPRA ……..…….APPELLANT**

**VERSUS**

**JAMES NZILI MASWILI…….……RESPONDENT**

***(Being an appeal from the judgment delivered in Murang'a Senior Principal Magistrate's Court Civil Case No. 109 of 2010 (Hon. E.J. Osoro on 25th July, 2011)***

**JUDGMENT**

In a plaint dated 18th march, 2010, the respondent sued the appellant and the attorney general in the subordinate court for general damages for wrongful and unlawful arrest, confinement in police cells and malicious prosecution. He also sought in the same suit damages for loss of earnings and special damages of Kshs. 30,000/= together with costs of the suit and interest thereof.

The appellant opposed the basis of the respondent's claim and in a defence dated 3rd June, 2010, he denied every allegation contained in the plaintiff's plaint in toto as if the same were set forth and traversed seriatim.

After hearing the case before her, the learned magistrate held that the respondent had proved his case on a balance of probabilities and in a judgment delivered 25th July, 2011, she awarded the respondent Kshs. 200,000/= as general damages together with costs of the suit.

The appellant was aggrieved by the decision of the learned magistrate and being so dissatisfied, he lodged the appeal herein on the following grounds:

1. That the honourable magistrate erred in law in awarding damages that were too high in the circumstances taking into account that the respondent failed to prove the particulars of malice as pleaded in the plaint against the appellant;
2. That the honourable magistrate erred in law in awarding damages of the sum of Kshs. 200,000/= without any justification or basis of the same;
3. That the magistrate erred in fact and in law in making a finding that the respondent only proved the agony he went through during the time while in remand custody yet held that the appellant was liable for this even though the appellant was not the one who remanded the respondent in custody;

4. That the honourable magistrate erred in fact in failing to make a finding on the evidence adduced by the police officer as to the fact that they had reasonable suspicion to arrest, confine and charge the respondent after carrying out their investigations;
5. That the honourable magistrate erred in law in making a finding that the Appellant's complaint

against the respondent was well orchestrated by the appellant to implicate the respondent without any justification for such finding;

6. That the honourable magistrate erred in fact and in law in finding that the appellant was furthering his cause to summarily dismiss the respondent by making a criminal complaint against him without taking into account the circumstances that led to the appellant's complaint;
7. That the honourable magistrate erred in law in relying heavily on the respondent's evidence which was uncorroborated;
8. That the honourable magistrate erred in law in making a finding that the foreign substance in the machine that led to its damage was introduced after the plaintiff had left without taking the evidence of all the defence witnesses in totality; and,
9. That the honourable magistrate erred in fact in failing to take into account the authorities cited on behalf of the appellant with regard to malicious prosecution.

The appeal was admitted by this court sitting in Nyeri, before the file was subsequently to Murang'a when the High Court station was established here in October, 2012.

On 8th May, 2014, parties took directions to the effect that the appeal be disposed of by way of written submissions; directions were given in that regard and subsequently, parties filed and exchanged written submissions.

The court has duly considered the parties submissions and the decisions which they cited in support of these submissions. One of the issues raised which, in my view, should be determined at the preliminary stage of this judgment is whether there is a competent appeal before this court. This question was raised by the respondent because, the appellant omitted from his record of appeal the decree against which he is appealing. According to the respondent's counsel this omission offends **Order 42 rules 2, 12, 13 and 33** of the **Civil Procedure Rules** and therefore the purported appeal is incompetent.

It is only reasonable that this issue should be determined at the preliminary stage of this judgment because since it goes to the issue whether there is in fact an appeal before this court, its determination may as well dispose of this appeal.

The relevance of a decree or an order in an appeal filed from the subordinate court is an issue that has been arising in this court in quite number of cases; the most recent case in which I deliberated on it was the appeal case of **Mary Kaunga Wanyaga versus Millicent Wanjiru Ndung'u (Civil Appeal No. 97 of 2013)**; in the judgment that I delivered in that appeal, I addressed this issue fairly extensively. As far as it is relevant to this appeal, I intend to adopt my interpretation in that case of **section 79G** of the **Civil Procedure Act** and **Order 42** of the **Civil Procedure Rules** as far as filing appeals from the subordinate court to this court is concerned.

**Section 79G** of the **Civil Procedure Act, Order 42 Rule 1(2)** and **Rule 13(4)** of the **Civil Procedure Rules**, are provisions that directly relate to the necessity of a decree or an order in every appeal that that is filed from the magistrates court; it is significant to note that they are couched in a mandatory language meaning non-compliance with these provisions will no doubt render the appeal fatally defective.

**Section 79G** of **the Civil Procedure Act** states:-

> 79G. ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

It is clear from this provision of the law that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court;

without the decree or order appealed from there is, in effect, no appeal. It is clearly for this reason that **section 79G** provides a window for extension of time to file the appeal if the decree or order could not, for one reason or another, be secured within the limitation period. It therefore follows that the preparation and delivery of the decree or order for the purpose prescribed in **section 79G** of the Act is a mandatory step without which no legitimate appeal can be said to have been lodged in the High Court against a decision of the subordinate court.

As if to reiterate the importance of these documents in filing of appeals to the High Court, **Order 42 rule 2 of the Civil Procedure Rules** is clear that:

> ***Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed.***

This rule envisages a situation where the appellant is set to lodge his memorandum of appeal but the order or the decree appealed against has not, in the words of section **79G** of the **Act**, been prepared and delivered; in that case the memorandum of appeal may be filed but the filing of the order or the decree must follow at the earliest opportunity possible or within such a time that the court may direct. It would be reasonable to conclude that without the order or the decree appealed against, the appeal will only be incomplete.

This point is buttressed by **Order 42 Rule 13(4)** of the **Rules** which is categorical that the record of appeal will not be complete without the decree or order appealed against; it provides:

> ***Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:***
>
> a. ***The memorandum of appeal;***
> b. ***The pleadings***
> c. ***The notes of the trial magistrate made during the hearing;***
> d. ***The transcript of any official shorthand, typist notes, electronic recording or palantypist notes made at the hearing;***
> e. ***All affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
> f. ***The judgment, the order or decree appealed from, and, where appropriate, the order(if any) giving leave to appeal:***
>
> ***Provided that-***
>
> i. ***a translation into English shall be provided of any document not in that language;***
> ii. ***the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).***

According to this rule, more particularly part f (ii) thereof although the judge has discretion to dispense with certain documents, he cannot dispense with an order or decree appealed from; they are primary and therefore mandatory documents that must form part of the record.

This rule as read with **section 79B** of the Act would imply that this appeal ought not to have been considered for rejection summarily under **section 79 B** of the Act or least of all, admitted for hearing in the absence of a certified copy of the decree.

The interpretation or application of these statutory and procedural provisions from the foregoing perspective has been approved as the correct interpretation in several court decisions appeal but the one which I found most apt is the Court of Appeal's decision in the case of **Kyuma versus Kyema (1988) KLR 185**. In this case the applicant was caught out by time such that he could not file his appeal against

orders issued by the magistrate's court without extension of time. He had applied for a "certified copy of the proceedings and judgment/orders". He ultimately got the certified copies of the proceedings and judgment and was also issued with a certificate of delay that certified the period required to prepare the proceedings and the judgment; apparently it is the delay in preparation and delivery of these documents that occasioned the delay in filing of the applicant's appeal.

When the appellant filed his appeal, the learned judge (Shields J, as he then was) held that the certificate of delay which was filed with the appeal was not the one contemplated under **section 79G** of the **Act 21**. He struck out the appeal and when the appellant appealed to the Court of Appeal, the latter upheld the High Court's judgment and said at page 187:

> ***The appellant was entitled to appeal to the High Court against these orders if he felt aggrieved by them. Section 65(1) of the Civil Procedure Act confers a right of appeal on him. But in order to set on foot a competent appeal, the appellant must have filed his appeal within thirty days from the date of the order…This period may be extended provided he obtained from the magistrates court a certificate of delay within the meaning of section 79G of Act 21. The section allows the thirty days to be extended by such period as was required to make a copy of the "decree or order of the court". As the appeal was to be filed beyond the 30 days prescribed by the rules, the appellant ought to apply and file with the memorandum of appeal, not only the order of the court, but also a certificate of delay. (Underlining mine).***

This means that whenever one intends to file an appeal **under section 79G** it is incumbent upon the intended appellant to apply for an order or a decree which he will file together with the memorandum of appeal; apart the memorandum of appeal and the decree the applicant must obtain and file a certificate of delay certifying the time taken to prepare and deliver the order or the decree should his appeal be filed outside the 30 day period. The court explained this better in its judgment. It said at page 187:

> ***The question is what documents must the appellant file within thirty days or within the time lawfully extended by the certificate of delay? Since the question contemplates that the appeal is against a decree or order, the appellant is obliged to apply first, Memorandum of Appeal in the form set out in appendix F No. 1 of the Civil Procedure Rules and second, a copy of the formal order of the court, if available. Rule 1A of Order 41 permits this latter document to be filed as soon "as possible and in any event within such a time as the court may order". Therefore a certificate of delay within the true intendment of section 79G must certify the time it took to prepare and deliver to the appellant "a copy of the order" of the magistrate. But the certificate of delay exhibited by the appellant, did not speak of a decree or order. No such order was sought or extracted. What the appellant, in error, sought and what the court dutifully supplied, were "the proceedings and judgment".***

**Rule 1A** of **Order 41** which the court referred to in its judgment is now **rule 2** of **Order 42** of the **Civil Procedure Rules, 2010**.

There is no evidence in the appeal herein that the appellant ever applied for the decree and therefore none could have even been issued.

Considering the law I have set out on this issue and considering that this court is bound by the decision of the Court of Appeal in the **Kyuma versus Kyema** case the only conclusion that I am inclined to come to is to strike out the appellant's appeal; it so struck out with costs.

**Signed, dated and delivered in open court this 20th day of June 2014**

Ngaah Jairus

JUDGE